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Supreme Court of the United States

OCTOBER TERM, 1952

No. 532

UNITED STATES OF AMERICA,
Appellant,

against

W. T. GRANT COMPANY, S. H. KRESS AND COMPANY and JOHN M. HANCOCK, *ET AL.*,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES JOHN M. HANCOCK, *ET AL.*

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Supreme Court of the United States

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UNITED STATES OF AMERICA,
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W. T. GRANT COMPANY, S. H. KRESS AND COMPANY and JOHN M. HANCOCK, *et al.*,
Appellees.

No. 532

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES JOHN M. HANCOCK, *ET AL.*

Opinion of the District Court

The opinion of the District Court has not been reported but appears at pages 72-74 of the record.

Jurisdiction

The Government has appealed under the Expediting Act, 15 U. S. C. § 28 (1946 ed.), 15 U. S. C. § 29 (1946 ed. Supp. V), from judgments entered in the United States District Court for the Southern District of New York (Conger, J.) dismissing as moot its complaint in three actions.

This Court noted probable jurisdiction on February 2, 1953.

The Statute Involved

Section 8 of the Clayton Act, 38 Stat. 733, 15 U. S. C. § 19 (1946 ed.) reads in relevant part as follows:

> "* * * no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, * * * if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would constitute a violation of any of the provisions of any of the antitrust laws. * * *"

Counterstatement of the Case

In each of three actions, the Government has charged that appellee John M. Hancock was a director of two corporate appellees, each of which has capital, surplus and undivided profits aggregating more than $1,000,000. All three actions were commenced on the same day, February 27, 1952 (R. 83, 87, 90).*

The Government complains that Mr. Hancock's directorships were in violation of Section 8 of the Clayton Act in that the corporate appellees are, by virtue of their business and location of operation, competitors, so that the elimination of competition by agreement between them would be forbidden by the anti-trust laws. The complaints

*Record references are to the pages of the printed record.

seek broad injunctive relief (R. 3-4, 28-29, 48-49). In each case, the appellees moved that the complaint be dismissed for mootness as well as on other grounds (R. 12, 15-16, 19, 38, 59-60, 67).

The District Court, treating the motions as motions for summary judgment, dismissed the complaints upon the ground that the controversy in each case was moot (R. 76-77, 79, 82). The District Court found that there is not

> "the slightest threat that the defendants will attempt any future activity in violation of Section 8 (if they have violated it already) * * *" (R. 73).

The Kroger-Jewel Tea Action

Civil Action 73-298 involves the directorships of Mr. Hancock in The Kroger Company and Jewel Tea Company, Inc., both of which corporations were named defendants in addition to Mr. Hancock (R. 46-47). The complaint alleges that the two corporations are engaged in the grocery business and that of the 2,000 stores operated by Kroger, 38 are in the Chicago area in which the stores of Jewel are located, and further alleges that the products sold by them are manufactured or purchased in different states from those in which they are sold.

As appears from the affidavit of Mr. Hancock in this case, Mr. Hancock's directorship in The Kroger Company was terminated on March 5, 1952 (R. 61). This was the date of the annual meeting of the stockholders of The Kroger Company, at which time Mr. Hancock's term of office expired, and he was not reelected as a director (R. 61-62).

At the annual meeting the President of The Kroger Company made a statement which appeared in the public press that Mr. Hancock had decided not to stand for reelection because of the suit brought by the Department of Justice, having given as his reason that "he would prefer to avoid the necessity for our company's contesting the suit" (R. 61-62).

Mr. Hancock's affidavit contains the following statement:

> "I have, of course, no intention of ever going back on the Board of Directors of The Kroger Company so long as I remain a director of Jewel Tea Company, Inc. I have, through my counsel, advised the Department of Justice of this fact. It is obvious that my resignation is in no way a temporary expedient or stratagem, but a seriously considered decision after conferring with the officials of the corporations involved. My decision could not be revoked by me even if I wished to take such action hereafter, which I would never do" (R. 62).

Mr. Thomas T. Oyler, General Counsel of The Kroger Company, filed an affidavit in the same action which included the following statements:

> "That the defendant Hancock is not now a member of Kroger's Board of Directors and that both Mr. Hancock and the corporation have given assurances that he will not become a director of Kroger, so long as he is a director of Jewel Tea Company" (R. 68).
>
> "That defendant Hancock has filed an affidavit stating that he will not serve as a director of Kroger so long as he is a director of Jewel Tea Company, Inc.; that The Kroger Company will not nominate

or propose said Hancock for election as a director and to the full extent of its powers it will not suggest or encourage his selection" (R. 70).

The Grant-Kress Action

The second case is Civil Action 73-296, involving the directorships of Mr. Hancock in W. T. Grant Company and S. H. Kress & Company, both of which corporations were named as defendants with Mr. Hancock (R. 1-2). The complaint alleges that the two corporations are engaged in what can be described as the department store business, and that of the 484 stores operated by Grant, 70 are located in communities where approximately 30% of Kress's stores are located, and further alleges that the products sold by them are purchased in different states from those in which they are sold.

As appears from the affidavit of Mr. Hancock filed in this action, Mr. Hancock resigned as director of S. H. Kress & Company on March 11, 1952 (R. 20). There is a statement with respect to Mr. Hancock's decision never to go back on the Board of Directors of S. H. Kress & Company similar to that contained in his affidavit in Civil Action 73-298 (R. 22).

In addition, there is an affidavit in this case by Mr. Orwill V. W. Hawkins, Vice President of S. H. Kress & Company, which includes the following statement:

> "On March 11, 1952, defendant Hancock resigned as a director of S. H. Kress & Company and has since sold his stock in the Company and returned to the Company his files of Company matters, and has completely disassociated himself with defendant Kress" (R. 17).

The Sears, Roebuck-Bond Action

The third action is Civil Action 73-297 involving Sears, Roebuck and Company and Bond Stores, Incorporated, both of which corporations are named as defendants together with Mr. Hancock (R. 26). The complaint alleges that both Sears and Bond sell, among other products, men's and women's apparel, and that of the 665 stores operated by Sears, 64 are located in communities where 80% of the stores of Bond are operated, and further that both companies sell by mail order, and further that the products sold by them are manufactured or purchased in different states from those in which they are sold, and in addition that sales are made across state lines.

In an affidavit by Mr. Hancock, filed in this action, it is stated that he resigned as a director of Bond Stores, Incorporated on March 14, 1952 (R. 39), and there is a statement of his decision never to go back on the Board of Directors of that company similar to that contained in his affidavit in Civil Action 73-298 (R. 41). In addition, there is an affidavit in this action by Mr. Irving Cohen, Vice President of Bond Stores, Incorporated, which includes the following statement:

> "On March 14, 1952 Mr. Hancock resigned as a director of Bond Stores, Incorporated. The object of this action has therefore been accomplished, and the question of whether his being a director of both companies at the same time violates Section 8 of the Clayton Act is now moot" (R. 43).

SUMMARY OF ARGUMENT

1. These cases are moot because of the discontinuance before trial of the alleged unlawful act, coupled with the

finding that the defendants are not likely to resume the wrong complained of.

2. The District Court was correct in finding that there was no threat of any future violation of Section 8, and the exercise of its discretion in dismissing the complaint will not be reversed.

3. It is unsound for the Government to contend that, although there is no possibility that Mr. Hancock will resume the three resigned directorships, it is entitled to an injunction against other future violations of Section 8.

4. The cases were appropriately decided by summary judgment.

5. There are other grounds for dismissal of the complaint.

Argument

POINT I.

THE APPLICABLE LAW.

A.

Precedents under Section 8 of Clayton Act.

The only court decision involving the precise question presented in the instant cases is *United States* v. *Mather* in the Northern District of Ohio. This case was an action under Section 8 of the Clayton Act against ten steel corporations and seven individuals alleged to be interlocking directors in two or more of the defendant corporations. The only report of this case is at Par. 2285, CCH Fed. Trade

Reg. Service (7th ed.), which reports the order of the District Court of February 11, 1936 dismissing the complaint without prejudice, on motion of the plaintiff.

The filed papers in the *Mather* case disclose the events leading up to the aforesaid order. On November 21, 1935, defendants Republic Steel Corporation, Delaware River Steel Company and Myron Wick moved to dismiss the complaint as to them on the ground that Wick had resigned as a director of Delaware River Steel Company after service of the complaint. On December 19, 1935 the court entered an order (Jones, J.) granting the motion to dismiss, which stated:

> "... the motions of the defendants, Myron A. Wick, Delaware River Steel Company, and Republic Steel Corporation, be, and the same hereby are, sustained on the sole ground that the case is moot as against said defendants, and that the petition be, and the same hereby is, dismissed as against the defendants. ..."

This dismissal was over the objection of the plaintiff, and due exception was taken.

Thereafter, on February 11, 1936, the plaintiff moved to dismiss the complaint, without prejudice, on the ground that the individual defendants were no longer interlocking directors of the corporate defendants. The purpose of plaintiff's motion was to make the dismissal one without prejudice, so that the court would retain jurisdiction in the event that the interlocking directorships should in the future be resumed.

Plaintiff's motion to dismiss without prejudice recited the prior dismissal as to some of the defendants, and stated:

"In granting said motions, the Honorable Paul Jones, United States District Judge for the Northern District of Ohio, stated in open court on December 2, 1935:

> 'I am certain these parties defendant would not be in any position in this court, have any standing, if they were brought back here again and charged with resuming the relationship, the dissolution of which they have urged as a basis for sustaining the motion.'

and that, in effect such resumption of the relationship charged

> 'would amount to a fraud on the court; because the court in sustaining this motion would have the right to assume that the cessation of the relationship was intended to be of a permanent character and obviate the necessity of the court's hearing the whole case and making a determination which would require the granting of a permanent injunction'.

Since it now appears that said defendants do not intend to resume said interlocking directorships, petitioner does not desire to proceed further by appeal from the order granting said motions."

This case is squarely in point. It is obvious that in the instant cases there is no possibility that a surreptitious attempt would hereafter be made by Mr. Hancock to go back on the Boards of any of the three companies of which he is no longer a director. The records of the Securities and Exchange Commission establish that the shares of these three corporations are listed on the New York Stock Exchange and they are subject to the rules of the Securities and Exchange Commission which require the disclosure, in the annual proxy statements sent to stockholders and filed

with the Commission, of the names of all nominees for directorship.* It is inconceivable that either Mr. Hancock or any of the three defendant corporations would take any action which, to quote the language of Judge Jones in *United States* v. *Mather*, would "amount to a fraud on the court".

In addition to this court decision, there are four decisions by Federal Trade Commission hearing examiners which reach the same result as the *Mather* case. The significance of these administrative decisions is enhanced by the special competence of the Federal Trade Commission to deal with the subject. It has been given at least concurrent jurisdiction with the courts (and as we contend below in this brief, exclusive jurisdiction) to enforce Section 8.

The first decision is *In the Matter of Allis-Chalmers Manufacturing Co., Chain Belt Company, Bucyrus-Erie Company, Inc. and Edmund Fitzgerald*, F. T. C. Docket No. 6027, November 6, 1952, 3 CCH Trade Reg. Serv. paragraphs 11,161, 11,257 (9th ed. 1952). In this case, Mr. Fitzgerald, the interlocking director, resigned after the proceedings had been commenced. Upon a motion to dismiss on the ground of mootness, the hearing examiner ordered that the complaint be dismissed. The opinion contained the following language:

> "As to mootness, this rests on change of fact. It appears that the individual respondent was and is the president of Northwestern Mutual Life Insurance Company, has had and has now little or no knowledge of the businesses of the corporate respondents, had no interest in any of them prior to becoming a director in them, acquired stock in them in modest amounts solely for that purpose, sought

*See S. E. C. Proxy Rules, Reg. X-14, especially Schedule 14A, Item 6, as amended Dec. 11, 1952, 17 Fed. Reg. 11431.

and obtained legal advice as to his eligibility under the statute involved before accepting election, was assured that the corporate respondents did not compete, had no pre-complaint knowledge of any objection by the Commission to his triple officership, promptly resigned after complaint, has no intention of resuming his directorships in any of corporate respondents, has acted in good faith and in an apparent desire to comply with the law in all respects since complaint was issued, and counsel in support of the complaint having no reason to believe anything to the contrary as to resumption of the activity complained of, it is not believed in the public interest to spend time and money in pursuing this proceeding any further, the result required by the statute having now been accomplished."

Following this decision, three other similar complaints were dismissed, each by a different hearing examiner, when the interlocking directorship was discontinued. The cases are:

Nesco, Inc., Ekco Products, Inc., David G. Baird and Arthur Keating, F. T. C. Docket No. 6026, 3 CCH Trade Reg. Serv. paragraphs 11,161, 11,257 (9th ed. 1952);

Whitin Machine Works, Draper Corporation and Phillips Ketchum, F. T. C. Docket No. 6023, 3 CCH Trade Reg. Serv. paragraphs 11,161, 11,282 (9th ed. 1952);

Vick Chemical Co., Colgate Palmolive Peet Co. and William R. Basset, F. T. C. Docket No. 6024, 3 CCH Trade Reg. Serv. paragraphs 11,161, 11,282 (9th ed. 1952).*

*We understand that the F. T. C. staff is appealing these decisions to the Commission.

B.

General Rule of Law on Question of Mootness.

The principle which is determinative of these cases, which justifies the District Court's dismissal of the complaint and which requires affirmance of the District Court's judgment is this: an action is mooted when (1) discontinuance before trial of the alleged unlawful act is coupled with (2) a finding that the defendants are not likely to resume the wrong complained of.

That principle has been settled beyond question by numerous decisions.*

A recent enunciation by the Court of the doctrine which governs these cases is in *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 421 (1945):

> "*First:* The District Court found that even though the former piece rate agreements be considered unlawful the respondent had no apparent intention of resuming their use. It also found no willful intention on the part of the respondent to violate the Act and no evidence of any intention of future violations. It therefore felt that there was no necessity for an injunction. While 'voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power,' *Walling* v. *Helmerich & Payne*, 323 U. S. 37, 43,

*United States v. Grower-Shippers Vegetable Ass'n., 344 U. S. 901 (1952); *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419 (1945); *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (2nd Cir. 1945); *Walling* v. *Shenandoah-Dives Mining Co.*, 134 F. 2d 395 (10th Cir. 1943); *United States* v. *National Lead Co.*, 63 F. Supp. 513, 527 (S. D. N. Y. 1945); *United States* v. *Hart-Carter*, 63 F. Supp. 982 (D. Minn. 1945); *United States* v. *William S. Gray & Co.*, 59 F. Supp. 665 (S. D. N. Y. 1945); *Walling* v. *Lacy*, 51 F. Supp. 1002 (D. Colo. 1943); *United States* v. *Krypton Co.*, 11 F. 2d 874 (S. D. N. Y. 1925).

it may justify a court's refusal to enjoin future activity of this nature when it is combined with a bona fide intention to comply with the law and not to resume the wrongful acts. Cf. *United States* v. *United States Steel Corp.*, 251 U. S. 417, 445. We cannot say, therefore, that the District Court abused its discretion in refusing to enjoin the abandoned method of wage payments."

The rule governing moot cases was stated earlier by the Court in *United States* v. *Hamburg-Amerikanische Packetfahrt-Actien Gesellschaft*, 239 U. S. 466, 475-476, (1916):

"While this mere outline shows the questions which are at issue and which would require to be considered if we had the right to decide the controversy, it at once further demonstrates that we may not, without disregarding our duty, pass upon them because of their absolute want of present actuality, that is, because of their now moot character as an inevitable legal consequence springing from the European war which is now flagrant—a matter of which we take judicial notice. *Montgomery* v. *United States*, 15 Wall. 395; *United States* v. *Lapene*, 17 Wall. 601; 7 Moore's International Law Digest, 244, 250. The legal proposition is not in substance controverted, but it is urged in view of the character of the questions and the possibility or probability that on the cessation of war the parties will resume or recreate their asserted illegal combination, we should now decide the controversies in order that by operation of the rule to be established any attempt at renewal or creation of the combination in the future will be rendered impossible. But this merely upon a prophecy as to future conditions invokes the exercise of judicial power not to decide on existing controversy, but to establish a rule for controlling

predicted future conduct, contrary to the elementary principle which was thus stated in *California* v. *San Pablo & Tulare R. R.*, 149 U. S. 308, 314; 'The duty of this court, as of every judicial tribunal, is limited to determining the rights of persons or of property, which are actually controverted in the particular case before it . . . when, in determining such rights, it becomes necessary to give an opinion upon a question of law, that opinion may have weight as a precedent for future decisions. But the court is not empowered to decide moot questions or abstract propositions, or to declare, for the government of future cases, principles or rules of law which cannot effect the result as to the thing in issue in the case before it . . .' "

Judge Learned Hand stated in *United States* v. *Aluminum Co. of America*, 148 F. 2d 416, 448 (2d Cir. 1945) the principle which governs these cases:

". . . . The mere cessation of an unlawful activity before suit does not deprive the court of jurisdiction to provide against its resumption; a 'case or controversy' may remain to be disposed of. There are plentiful authorities so holding. [Cases cited.] To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated."

The above language of Judge Hand is quoted with approval in *U. S.* v. *Hart-Carter Co.*, 63 F. Supp. 982 (D. Minn., 1945). In dismissing an action under the Sherman anti-trust Act, the court said:

"In this case there is no 'reasonable expectation' or 'dangerous probability' [cases cited] that the acts complained of will be repeated" (Page 985).

Similarly, in *Walling* v. *Lacy*, 51 F. Supp. 1002, 1004, 1005 (D. Colo. 1943), in a suit by the Wage and Hour Administrator to enjoin unwitting violations of the Fair Labor Standards Act which were abandoned during the trial, the court dismissed the action as moot, stating:

> "It is well settled that an injunction cannot be granted to restrain past violations of the law, and where in the course of the proceedings in a litigated matter the controversy between the parties has come to an end by the act of either of the parties, the question is 'moot' and the court is not required to take any further action. Walling v. Shenandoah-Dives Mining Co., 10 Cir., 134 F. 2d 395.
>
> * * * *
>
> "In Walling v. Shenandoah-Dives Mining Co., March 8, 1943, supra, our Court of Appeals held that when in the course of a trial the matter in controversy comes to an end, either by the act of one or both of the parties, or operation of law, the question becomes 'moot', and the court is without jurisdiction. The case also holds that an injunction cannot be employed to punish past violations, or to establish that violations had occurred. But its function is to stop existing violations, or prevent further infractions, if there is reason to believe they may occur. And if, during the action brought to enjoin violations of the Fair Labor Standards Act, the alleged violations cease, and there is no reason to believe future violations will occur, the question becomes 'moot', and an injunction will not be granted.
>
> * * * *
>
> ". . . The defendant, as a result of her past experience and the time and expense involved in coming to Denver for trial—168 miles from home—is fully

> cognizant of the penalties of further violations of this sumptuary legislation. She has expressed to the Government and the court her desire to fully comply with the demands and exactions of the Administrator. Surely the all-powerful Administrator could ask for nothing more."

The correctness of the District Court decision appealed from seems established by *United States* v. *Grower-Shippers Vegetable Ass'n.*, 344 U. S. 901 (1952). In that case, the Government sought to enjoin a conspiracy which had as one of its aims the destruction of lettuce harvests in order to prevent the selling price from falling below predetermined price levels. The United States District Court for the Northern District of California (Goodman, J.), on motion made orally at pretrial proceedings, dismissed the complaint for mootness. It appeared from the appellees' opposing statement in the *Grower-Shippers Vegetable Ass'n.* case that the District Court (as in the case at bar) had found that there was no evidence that the defendants were likely to resume the conduct complained of:

> "I just don't see any purpose in the desire to get on a trial a permanent injunction for the restraint in the future of the parties to an agreement which by its very terms has expired and cannot be revived except by a new agreement of some kind which all of these people have to enter into, depending upon what the conditions are at the time.
>
> * * * *
>
> "How do we know that anybody—what evidence do we have that anybody in the future is going to enter into precisely that kind of a contract. We don't know that. There is no evidence to that effect. We don't know. We don't even know whether these

> people are going to be growing lettuce a year from now.
>
> * * * *
>
> ". . . there hasn't been anything presented to the Court that indicates in the slightest degree that there is any likelihood of any defendant in this case violating the statute on the basis of what has transpired so far."

This Court summarily affirmed the judgment of the District Court dismissing the complaint.

C.

Cases Cited by the Government

Turning now to the cases cited by the Government in its brief upon the question of what is the test of mootness, we shall first discuss the four cases upon which the Government apparently places chief reliance.

The first case is *Sears, Roebuck & Co.* v. *Federal Trade Commission*, 258 Fed. 307, referred to in the Government's brief at pages 16 and 17. The Government quotes from the opinion a statement reading as follows:

> "So here, no assurance is in sight that petitioner, if it could shake respondent's hand from its shoulder, would not continue its former course."

which language it considers applicable to the instant cases.

We submit that an examination of the decision in that case makes clear that the facts involved are entirely different from the instant cases. The opinion, after pointing out that petitioner had discontinued the questioned practices and had stated in its answer that it had no intention of resuming them, contains the following language:

> "But respondent was required to find from all the evidence before it what was the real nature of petitioner's attitude. It was permissible for respondent to take judicial notice of the government's wartime control of sugar sales and consumption. It was also proper to note that petitioner was contending (and still contends) that the act is void for indefiniteness, that the act is unconstitutional, and that the act, even if valid, under any proper construction has not been infringed by petitioner's practices." (Page 310)

Because of these facts the court was not satisfied that there was no danger of a renewal of the practices which had been discontinued.

The next case quoted from by the Government at page 17 of its brief is *U. S.* v. *Aluminum Co. of America*, 148 F. 2d 416.

The Government points out that it was held in this case that the discontinuance of certain activities some twelve years before the action was commenced did not render the case moot. These are, however, only a part of the facts. The complete picture appears from the following language in the opinion:

> "To disarm the court it must appear that there is no reasonable expectation that the wrong will be repeated. That is not true in the case at bar. Unless we are to grant an injunction, we ought not pass upon the issue; if we do not pass upon the issue, we are by no means persuaded that 'Limited,' when peace comes, will not enter into another 'cartel' which again attempts to restrict imports. It has insistently argued that the Act does not cover such an agreement; and it alleges that it was forced into the 'cartel,' if it was to do a European business at all. It may be forced to do so again, unless a judgment forbids." (Page 448)

Here again we submit that the distinction between that case and the instant cases is obvious.

The third case which is quoted from by the Government at page 18 of its brief is *National Labor Relations Board* v. *General Motors Corp.*, 179 F. 2d 221.

While the Government has quoted one sentence from the opinion, we desire to quote from it more fully as follows:

> "At any rate it is well settled in Labor Board cases that the Board need not dismiss the proceeding and that the courts need not refuse to enforce the Board's order, because, pendente lite, the original dispute has been settled. The question whether the settlement shall be accepted as definitive is for the Board to decide; and that was peculiarly true of the case at bar. True, it is plain that the respondent was only awaiting a final determination whether 'group insurance' was within the Act; and it is to the last degree unlikely that it will again deny that it is. Nevertheless, although negotiations are under way, no one can be sure that they will end in an agreement; and if they do not, it is at least conceivable that the union may claim that they have broken down because the respondent had from the outset determined that they should. It should have the privilege of presenting such a contention directly to a court without passing again through the Board." (Page 222.)

Here again the facts as to the complete termination of the alleged wrong are entirely different from the instant cases.

The final case which the Government quotes from and discusses at length at pages 18 and 19 of its brief is *Welling* v. *Helmerich & Payne*, 323 U. S. 37.

The nub of the court's decision which is not quoted in the Government's brief is contained in the following language:

> "In granting certiorari upon the question of the legality of the split-day plan we asked for a discussion of the question whether respondent's discontinuance of the plan rendered the case moot. 321 U. S. 759. We hold that the case is not moot under these circumstances. Despite respondent's voluntary cessation of the challenged conduct, a controversy between the parties over the legality of the split-day plan still remains. Voluntary discontinuance of an alleged illegal activity does not operate to remove a case from the ambit of judicial power. [Cases cited.] Respondent has consistently urged the validity of the split-day plan and would presumably be free to resume the use of this illegal plan were not some effective restraint made. There is thus 'an actual controversy * * *'." (Page 43)

There was thus in this case no ground for believing that the use of the split-day plan might not be resumed by the defendant. That this case is completely consistent with the view for which we are contending is made clear by the reference to it in *Walling v. Youngerman-Reynolds' Hardwood Co.*, 325 U. S. 419, quoted from above at page 12 of this brief.

In addition to the above cases, there are additional cases referred to more briefly by the Government in its brief; of these, three only are of sufficient importance to advert to.

At page 12, the Government cites *Federal Trade Commission v. Goodyear Tire & Rubber Co.*, 304 U. S. 257. In this case, a price arrangement was found illegal by the Federal Trade Commission, and thereafter discontinued

by the defendant. Upon appeal, the Circuit Court of Appeals held that the case was moot. This Court reversed in an opinion containing the following language:

> "Both the Commission and the respondent contended below, and contend here, that the case has not become moot. While they disagree in their reasoning, they come to the same conclusion upon this point, and both ask that the case be remanded to the Circuit Court of Appeals with directions to determine it upon the merits. We think that their conclusion is correct and that the remand should be made." (Page 259)

At page 13, the Government cites *Local 74, United Carpenters and Joiners* v. *National Labor Relations Board*, 341 U. S. 707. The relevant portion of the opinion follows:

> "We have considered the remaining questions raised by petitioners, based on constitutional or other grounds, and have resolved them in favor of sustaining the Board and the court below. This case has not been rendered moot by the completion of the renovation project. The complaint was against petitioners' use of secondary pressure upon Watson's in a manner prescribed by the statute. The use of such pressure on this renovation project was merely a sample of what might be repeated elsewhere if not prohibited. The underlying dispute between petitioners and Watson's has not been shown to have been resolved." (Page 715)

At page 13, the Government cites *Porter* v. *Lee*, 328 U. S. 246. The actual holding appears from the following:

> "Second. We also think the Circuit Court of Appeals erred in holding that the case was moot. The mere fact that the Beevers, in order to comply

with the writ of possession, vacated the apartment, was not enough to end the controversy. * * * Here the Administrator sought to restrain not merely the eviction of Beever but also that of any other tenant of the landlord as well as other acts in violation of the Regulation. * * * If the eviction proceeding actually was a violation of the Regulations, then Beever's vacating the premises was merely the completion of one violation. The issue as to whether future violations should be enjoined was still before the Court and was by no means moot." (Page 251, 252).

There is obviously nothing in any of these cases which sustains the Government's position.

POINT II.

THE DISTRICT COURT WAS CORRECT IN FINDING THAT THERE WAS NO THREAT OF ANY FUTURE VIOLATION OF SECTION 8.

The District Court found that there is not

> "the slightest threat that the defendants will attempt any future activity in violation of Section 8 (if they have violated it already) * * *" (R. 73).

The facts which are the basis for this finding are outlined above.

The Government in its brief, under Point II commencing at page 14, asserts that this finding was not warranted by the facts. The Government's argument is divided into two parts, one dealing with the possibility of a resumption by Mr. Hancock of one or more of the three interlocking directorships involved in the instant cases, and the other dealing

with the possibility of some different future interlocking directorships. We shall discuss these two situations separately.

A.

There is no threat of the resumption of any of the three interlocking directorships involved in the instant cases.

The detailed facts with respect to the termination of the interlocking directorships involved in the three instant cases have been summarized above. The Government advances two offsetting arguments.

The first argument is that Mr. Hancock did not resign until after the institution of litigation

> "Although the Government had been endeavoring to procure the termination of Hancock's interlocking directorships for almost five years * * *" (Brief p. 15).

Not only does this statement of alleged fact not cast any doubt upon the finding of the court below, but what is more important, it is not accurate.

All that appears in the record with respect to this matter is Mr. Hancock's affidavit, the relevant portion of which reads as follows:

> "The question of the application of Section 8 of the Clayton Act to directorships held by me was first raised by the Department of Justice in the letter from John F. Sonnett, Assistant Attorney General, dated June 19, 1947. During the period of almost five years from such date to the beginning of this action, my counsel and I had numerous conferences with the Department of Justice and submitted nu-

merous memoranda of facts and of law to the Department of Justice" (R. 40).

Since the Government has gone outside of the record in making the statement that it had been "endeavoring to procure the termination of Mr. Hancock's interlocking directorships for almost five years", we believe that we are justified in going outside of the record by submitting, as Appendix A to this brief, a copy of a letter from Mr. Sonnett to Mr. Hancock of June 19, 1947, which refers to the fact that Mr. Hancock is a director of eleven corporations, including the six corporate defendants in the instant cases, calls his attention to Section 8 of the Clayton Act, and then concludes as follows:

> "While we do not mean to imply that by holding some or all of these directorships, you are necessarily violating the antitrust laws, we think that the matter raises serious questions under those laws which we would like to discuss with you or your counsel as soon as possible."

The Government's second point is that Mr. Hancock has stated that "it is doubtful whether Section 8 of the Clayton Act" applies to the interlocking directorships involved, and that "he expressly has declined to acknowledge their illegality" (Brief pp. 15, 19).

We desire in the first place to point out that the statement in the Government's brief that Mr. Hancock "expressly has declined to acknowledge their illegality" is completely unsupported by the record. There is no evidence whatsoever that he was ever asked to acknowledge the illegality of his directorships or that he declined to do so. The sole evidence in the record is that he had been

advised by his counsel that it was doubtful whether Section 8 applied to the directorships involved.

We submit that this fact is not the slightest basis for an inference that there is any possibility of Mr. Hancock's resuming the three interlocking directorships involved in the instant cases. The record establishes that the three interlocking directorships had existed in one case since 1927 and in the other two cases since 1940 (R. 64, 14, 44) and that a question was raised as to them by the Government for the first time in 1947. The first indication in the record that the Department of Justice had reached a final decision that any of the interlocking directorships referred to in Mr. Sonnett's letter violated Section 8 is the statement in the affidavit of Mr. Hawkins, Vice President of S. H. Kress and Company, that the Department of Justice notified counsel for Mr. Hancock under date of January 23, 1952 that it was the intention of the Department of Justice to institute legal proceedings (R. 17). Certainly in view of these facts counsel for Mr. Hancock were justified in continuing to express doubts as to whether Section 8 of the Clayton Act had been violated. We do not believe that there is any principle of American jurisprudence which requires Mr. Hancock, in complying with the final decision of the Department of Justice, to also have to admit that what he had done in good faith was illegal. Even in a criminal proceeding a defendant who does not wish to put in a defense is not required to confess his guilt, but may make a plea of *nolo contendere*.

The language reported above from the opinion in *Walling* v. *Lacy* with respect to the defendant is applicable here:

> "She has expressed to the Government and the court her desire to fully comply with the demands and exactions of the Administrator. Surely the all-powerful Administrator could ask for nothing more."

The above are the only arguments advanced by the Government to support its contention that the District Court was wrong in finding that there was not the slightest threat that the interlocking directorships involved in the three instant cases would be resumed. We submit that these arguments are without merit.

B.

There is no threat of any future different violations of Section 8 by any of the defendants.

The Government contends that the facts established by the record indicate

> "a real and present danger of further violations of the statute"

involving other interlocking directorships (Brief, p. 14).

The first argument is that three interlocking directorships are involved, each constituting a violation of Section 8. (Brief p. 14).

We submit that this fact does not constitute any basis for assuming other future violations by Mr. Hancock. His violations—if they existed—were unwitting and are no evidence of any tendency or proclivity on his part which is apt to lead to future similar violations.

The second argument in support of this contention is that Mr. Hancock's affidavits did not state that he would not enter into other interlocking relationships in the future,

and the third argument is that the defendant companies gave no assurance that they would not, in the future, elect to their boards other directors in violation of Section 8 (Brief, p. 16). We submit that the failure of Mr. Hancock and the defendant corporations to give such assurances on the record is not the slightest evidence that any of them contemplated other violations of Section 8 in the future. None of the three complaints contained any allegation that such future action was threatened by any of the seven defendants. If they had or if the Government had indicated below that they considered it important, the defendants would of course have given such assurance. The fact is that there was not the slightest occasion for the defendants, in their affidavits, to answer allegations that had not been made.

The fourth argument advanced by the Government is that Mr. Hancock is a director of fourteen other companies besides the defendant corporations, that he is a partner in Lehman Brothers, and that he testified in 1940 as to the practice of that firm with respect to asking for representation on boards of directors of companies whose financing it has handled (Brief, p. 17; Note 5, p. 15). With respect to this argument of the Government, we would like to first call attention to the fact that none of these facts are in the record, although the Government, of course, had ample opportunity to introduce affidavits in opposition to the motion made by the defendants. We submit, therefore, that it is improper to refer to these facts before this Court, especially when the defendants are deprived of any opportunity by answering affidavits to point out additional facts bearing upon the facts stated by the Government, such as, for example, the identity of the other companies and the fact that the purpose of Lehman Brothers in asking for repre-

sentation was for the protection of the investors who were purchasing the securities on their recommendation.

However, even assuming that the Court will consider these new facts presented by the Government, we submit that they do not support the Government's contention.

In the first place, by no conceivable stretch of the imagination are they any basis for arguing that there is "a real and present danger" of new violations of Section 8 by any of the six defendant corporations. Obviously, the most that can be claimed for the argument is that it may have some application to Mr. Hancock.

In the second place, even as to Mr. Hancock's future actions, we submit that no logical argument can be made to sustain the Government's contention. Taking up first the fact that Mr. Hancock is a director of fourteen other companies, what inference can be drawn from this? Certainly in view of the careful combing over of Mr. Hancock's directorships over a period of five years it must be assumed that the Department of Justice reached the conclusion that none of the other fourteen directorships involved any violation of Section 8. If the contrary had been the case, how explain the failure of the Department of Justice to bring additional actions at the time it instituted the three instant cases?

Next, with respect to Mr. Hancock's testimony in 1940, assuming that Lehman Brothers are still following the same practice twelve years later—which assumption is, of course, completely unproven—first, why should it be assumed that they will hereafter finance a company competing with one of the 17 of which Mr. Hancock is a director, and second, why should it be assumed if they do that Mr. Hancock should be chosen to go on the board of such company? The fact is, as appears from Who's Who, that Mr. Hancock

has reached his seventieth birthday and it is extremely unlikely that Mr. Hancock, at that age, and already a director of so many companies, would be chosen to go on any additional boards of directors.

We submit therefore that even if these facts outside the record be considered, there is no basis for building up from them a structure of assumptions which would be sufficient to indicate that there is "a real and present danger" of new violations of Section 8 by Mr. Hancock or the defendant corporations.

We conclude, therefore, that the District Court's finding was clearly correct in that there is no evidence in the record that there is any threat that Mr. Hancock or the defendant corporations will attempt hereafter to violate Section 8. Even if the facts now adduced by the Government had been put in the record below, they would furnish no basis for questioning the finding of the court below.

C.

The dismissal of the complaints was not an abuse of discretion.

In view of the District Court's finding that there is not the slightest threat of future illegal activity by the defendants and in view of the Government's failure to make even a colorable showing of threatened future violations, it was within the discretion of the District Court to dismiss the complaints.

As the Court has said in another case in which the alleged unlawful conduct was discontinued prior to the time for the formulation of the decree, one who invokes equity jurisdiction subjects himself to the discretion of the court:

> "An appeal to the equity jurisdiction conferred on federal district courts is an appeal to the sound discretion which guides the determinations of courts of equity."

Hecht Co. v. *Bowles*, 321 U. S. 321, 329 (1944). See also *Meredith* v. *Winter Haven*, 320 U. S. 228, 235 (1943). The discretionary nature of the judgments appealed from is made clear, also, by *Walling* v. *Youngerman-Reynolds Hardwood Co.*, 325 U. S. 419, 521 (1945) and *Walling* v. *Shenandoah-Dives Mining Co.*, 134 F. 2d 395 (10th Cir. 1943).

The sworn statement submitted to the District Court by Mr. Hancock and the affidavits executed by responsible officials of the defendant corporations preclude any determination by this Court that the District Court abused its discretion. Indeed, the record permits no finding other than that which was in fact made by the District Court. Despite ample opportunity, the Government made no attempt to controvert the factual showing made by the defendants and presented no evidence to support any contention that Mr. Hancock or any of the corporate defendants were likely to resume the relationships complained of or commit any other future violations of the Act.

POINT III.

IT IS UNSOUND FOR THE GOVERNMENT TO CONTEND THAT ALTHOUGH THERE IS NO POSSIBILITY THAT MR. HANCOCK WILL RESUME THE THREE RESIGNED DIRECTORSHIPS IT IS ENTITLED TO AN INJUNCTION AGAINST OTHER FUTURE VIOLATIONS OF SECTION 8.

The third specification of error is that the District Court erred "in failing to grant the relief prayed in the complaints".

This specification of error, which is in addition to the specification of error that the cases were dismissed as moot, raises in a somewhat hidden manner the real issue in these cases. That issue is not whether the defendants should be enjoined so as to prevent Mr. Hancock from again going back on the boards of the three corporations which he has gotten off. As has been shown above, there is not the slightest possibility that he would attempt to do this, and if that were all that the Government was seeking to prevent there would have been no reason for the defendants not to have entered into a consent decree.

What the Government is insisting on, however, is something quite different, as is shown by an examination of the relief demanded in the complaints. In addition to an injunction preventing the reestablishment of the interlocking relationships which have been terminated, the Government is asking for (R. 4, 28-29, 49):

1. An injunction against Mr. Hancock's being on any board of directors of any other competing companies.

2. An injunction against each of the six defendant corporations having any other interlocking directors with other competing companies.

In other words, the Government is asking as relief a decree which is not limited to preventing the alleged wrongs which have occurred from being repeated, but one which also is intended to prevent some other entirely disconnected wrongs which the Government suggests might possibly occur.

A.

The Error in the Government's Argument.

The contention of the Government on this point is that if Mr. Hancock had not resigned, and if the instant cases had been tried, and if Mr. Hancock's directorships should have been held to violate Section 8, then the Government would have been entitled to an injunction against the continuance of the three interlocking directorships involved, and also against any future violations of Section 8 by Mr. Hancock or any of the six defendant corporations. This being so, the Government argues that it should not be deprived of its right to a decree against future violations of the Section merely because Mr. Hancock has terminated the three existing interlocking directorships. To reach such a result by invoking the doctrine of mootness would, the Government contends, deprive it of part of the relief which it is entitled to in the instant cases.

This argument, at first blush, has a superficial appeal, but we submit that analysis will disclose its unsoundness.

The fundamental error in the argument is that if these cases had been tried and a violation of Section 8 found to have existed, the Government would not have been entitled to the broad injunctive relief which it is asking for. It is, of course, true, as the Government contends, that the District Court's power generally goes beyond ending a specific illegal act and, especially in Sherman Act cases, it may enjoin future illegal practices, different from but similar to those found to have been committed. It is, however, equally true that a defendant who has been found to have committed a violation of a statute cannot, because of this

fact alone, be enjoined from committing any future violation of the same statute.

The general test of the proper extent of an injunctive decree is, we submit, the following: The decree should not only enjoin a repetition of the specific unlawful act which has been committed, but it should also enjoin any similar unlawful acts or practices designed to accomplish the same objective as that of the act committed. Stated differently, the purpose or motivation back of the unlawful act which has been committed should be considered, and if that purpose or motivation can reasonably be expected to translate itself into action in the future in some different but similar form to that of the past, this future action can properly be enjoined.*

This test, we submit, is the same test which should be applied in determining whether or not a case is moot. A case is not rendered moot by the mere fact that there is no expectation that the discontinued action will be renewed, provided there is a ground for believing that some other action may be taken hereafter designed to carry out the objective of the original action which was terminated.

Applying this test to the instant cases, we submit that the following conclusions necessarily follow:

Taking up first the six defendant corporations, it is clear that the fact that they may have had an interlocking director in violation of Section 8 is not the slightest ground for an inference that there is any likelihood of their having another interlocking director in the future. In the first

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*NOTE: We are here assuming that the general rule is applicable to this case. See, however, page 41 *infra*, where we point out that Section 11 limits the relief to requiring a cessation of the unlawful interlocking directorship.

place, assuming that the defendant corporations knew of the interlocking relationships, there is no ground for the assumption that the interlocking directorships were in any way a part of any scheme or plan to restrain competition between the corporations involved. Not the slightest evidence has been advanced to suggest the existence of any such facts, and there is every reasonable ground for assuming the contrary.

Secondly, there is thus no ground for presuming that the defendant corporations are going to hereafter seek to elect some other interlocking director in place of Mr. Hancock to carry out some assumed existing objective of restraining competition; to take such action would be a fraud on the Court and inconceivable.

Thirdly, there is thus likewise no ground for assuming that any of the defendant corporations will hereafter unlawfully elect an interlocking director with some other corporation or corporations. There is no greater probability that the defendant corporations will seek hereafter unlawfully to enter into a new interlocking relationship than there is that any other corporation in the United States will take such action in the future. Certainly it cannot be claimed that there is a basis for inferring the adoption by any of the defendant corporations of a pattern of entering into unlawful interlocking relationships with other corporations merely because of Mr. Hancock's directorships.

In summary, if the instant cases had proceeded to trial and a violation of Section 8 had been found to exist, we contend that the District Court should not have properly granted the broad injunctive relief demanded by the Government against the six defendant corporations, but should have limited itself to an injunction against the renewal by

them of Mr. Hancock's interlocking relationship. If we are right in this contention, it follows that this ground of the Government's complaint against the decision below is demonstrated to be unsound.

Turning now to the injunction demanded by the Government against Mr. Hancock's committing any violations of Section 8 in the future: Here the inferences from the facts are similar. In the first place, there is no ground for inferring that Mr. Hancock went on any of the boards of the six defendant corporations for the purpose of bringing about a diminution of competition between such corporations. On the contrary, the only purpose of Mr. Hancock's going on the boards of directors suggested by the Government in its brief is that contained in Mr. Hancock's testimony at the Temporary National Economic Committee hearings in 1940 that the investment banking firm of which he was a member had at that time a traditional practice of asking for representation on the boards of directors of companies whose financing it had handled. Certainly this testimony, relied upon by the Government, indicates that Mr. Hancock's purpose in going on boards of directors had nothing to do with any plan of restraining competition between the companies involved.

Secondly, the facts as stated by the Government in its brief that Mr. Hancock was a director of at least fourteen other companies, which directorships were not claimed by the Government to violate Section 8, is additional evidence that Mr. Hancock's going on boards of directors had nothing to do with the question of whether the corporations involved were competing, and therefore require the inference that his going on boards of directors had nothing whatsoever to do with any plan of restricting competition between any corporations.

Thirdly, since there is no basis for inferring that Mr. Hancock's interlocking directorships were entered into for the purpose of carrying out any plan of restricting competition, there is no greater probability of his hereafter entering into a new interlocking directorship in violation of Section 8 than there is of any other person in the United States. The evidence is clear that he entered into the three interlocking directorships here involved in good faith and without knowledge of their unlawfulness. Certainly no claim of any proclivity to violate Section 8 in the future can be based on any unwitting past violations.

Accordingly, if the instant cases had been tried and violations of Section 8 found to have existed, we contend that the Government would not have been entitled to the broad injunctive relief which it is asking against Mr. Hancock, namely, to prohibit his ever hereafter violating Section 8.

B.

The unsoundness of the Government's contention is confirmed by consideration of the *Weinberg* Case.

That the Government's contention that it would have been entitled to the blanket decrees which it is asking for in the event of a trial of these cases and a decision in favor of the Government, is unsound, is confirmed by a consideration of the case of *U. S. v. Sears, Roebuck and Company, The B. F. Goodrich Company and Sidney J. Weinberg*, S. D. N. Y. Civil Action No. 73-293 which is referred to in the Government's brief at page 10 in Note 4. This case, involving a claimed violation of Section 8, was brought on the same day as the instant cases. For some reason no

mention was made of it below in the instant case involving Sears, Roebuck & Co.

If the blanket decree demanded by the Government in the instant case involving Sears, Roebuck & Co. should be granted, the Government could immediately thereafter ask that Sears, Roebuck & Co. be cited for contempt for violation of the decree because of the continuance on its board of Mr. Weinberg. Thus, while the *Weinberg* case was *sub judice* and had not been decided, the Government could subject Sears, Roebuck & Co. to the necessity of defending the same case in another tribunal, and if the *Weinberg* case were ultimately decided in the Government's favor, the Government could then demand that Sears, Roebuck & Co. should be held guilty of contempt for violating the injunction against it, whereas Mr. Weinberg and The B. F. Goodrich Company could merely be restrained from continuing the existing interlock. This would be a striking example of placing the defendant Sears, Roebuck & Co. for the future "in a different class than other people", which the Court in *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 409 (1945), specifically stated was beyond the power of a court to effect through the issuance of an injunctive decree.

The Government may, of course, contend that it made a mistake and did not intend to cover the *Weinberg* case by the injunction which it has asked for against Sears in its complaint (R. 25, fifth prayer for relief). Even if it were to make such a modification of the relief requested, it would not be adequate. It would be equally improper if the Government should hereafter claim a violation involving one of the defendant corporations, some third individual, and some other corporation, and thereupon try the

issue through contempt of court proceedings against the defendant corporation involved, without ever making the individual director or the other corporation a party to the proceedings. Likewise, it would be equally improper if the Government should hereafter change its mind and claim a violation by Mr. Hancock and two of the corporations named in Mr. Sonnett's letter of June 19, 1947 but not defendants in the instant cases, and should then come into court and ask that Mr. Hancock be held guilty of contempt for violating an injunction against him obtained in one of the instant cases.

We believe that a consideration of these possibilities demonstrates that the proper and the only proper method of presenting to the courts another separate and entirely distinct alleged violation of Section 8 if it should arise, involving any of the defendants, is by instituting an appropriate action and obtaining the complete relief which the Government may be entitled to in such action.

C.

The Law.

The authorities are clear that injunctive relief against the repetition of an unlawful act should not be broadened so as to include an injunction against the commission of other different and unrelated unlawful acts. As the Court said in *National Labor Relations Board* v. *Express Publishing Co.*, 312 U. S. 426, 436 (1941):

> "This Court will strike from an injunction decree restraints upon the commission of unlawful acts which are thus disassociated from those which a defendant has committed."

"It is a salutary principle that when one has been found to have committed acts in violation of a law he may be restrained from committing other related unlawful acts. But we think that without sacrifice of that principle, the National Labor Relations Act does not contemplate that an employer who has unlawfully refused to bargain with his employees shall for the indefinite future, conduct his labor relations at the peril of a summons for contempt on the Board's allegation, for example, that he has discriminated against a labor union in the discharge of an employee, or because his supervisory employees have advised other employees not to join a union. * * * The breadth of the order, like the injunction of a court, must depend upon the circumstances of each case, the purpose being to prevent violations, the threat of which in the future is indicated because of their similarity or relation to those unlawful acts which the Board has found to have been committed by the employer in the past."

While the Court said in the *Express Publishing* case that acts "similar" to those found to be unlawful may be enjoined, we believe it is clear that the opinion as a whole does not intend to refer to other acts which are similar only in that they are proscribed by the same statute. See *Hartford-Empire Co.* v. *United States*, 323 U. S. 386, 409 (1945).

We recognize that a District Court, in fashioning a decree to prevent future violations of the antitrust laws, is generally not limited to prohibiting illegal practices in the "precise form" in which they were found to have existed in the past. *Federal Trade Comm'n.* v. *Ruberoid Co.*, 343 U. S. 470, 473 (1952). We are not concerned in these cases, however, with the application of such unprecise standards as are

embodied in the Sherman Act "rule of reason" or the Federal Trade Commission Act's prohibition of "unfair methods of competition". Obviously, violations of standards so unprecise and broad can take many forms. Here, the command of Section 8 of the Clayton Act is itself so precise that violations can take no other form than that described in the statute.

We recognize, also, that a District Court, in fashioning decrees in antitrust cases, is generally not required to block off only the already worn roads to the prohibited goal, leaving open those roads as yet untraveled. *Federal Trade Comm'n.* v. *Ruberoid Co.*, 343 U. S. 470, 473 (1952); *United States* v. *United States Gypsum Co.*, 340 U. S. 77, 88 (1950); *International Salt Company* v. *United States*, 332 U. S. 392, 400 (1947). However, with respect to Section 8 of the Clayton Act, there is but one road to the illegal objective and once that one road has been closed there is no need for further relief. It follows that the only relief which should properly be granted in the case of a violation of Section 8 of the Clayton Act is an injunction against the repetition of the specific violation involving the same director and the same two corporations.

This position is succinctly stated in an article by one of the senior officials of the anti-trust division of the Department of Justice, who is also one of the lawyers for the Government on this appeal, which is cited by the Government in its brief. See Kramer, *Interlocking Directorships and the Clayton Act after 35 Years*, 59 Yale L. J. 1266, 1271 (1950):

> "In Section 8 matters the relief desired is simple and specific: resignation from all but one of the boards of the competing corporations."

His conclusion is supported by a distinction between the general rule applicable to judgments in anti-trust cases, on the one hand, and the law with respect to judgments in proceedings to enforce Section 8 of the Clayton Act, on the other hand. In contrast with the broad powers of the court with respect to judgments in other types of anti-trust cases, the Congress has prescribed the appropriate form of relief when a violation of Section 8 has been found.

Section 11 of the Clayton Act vests authority to enforce compliance with Section 8 in the Federal Trade Commission and prescribes that upon a finding of a violation, the Commission shall issue an order requiring the cessation of the interlocking directorship found to be contrary to the provisions of Section 8.

Unlike violations of the Sherman Act and certain violations of the Clayton Act, the Congress did not see fit to prescribe criminal or other sanctions for a violation of Section 8 of the Clayton Act, but merely to require cessation of interlocking directorships found to be illegal. Therefore, not only is the Government in error in claiming that it is entitled to a broad injunctive decree under the rules announced by this Court in other types of anti-trust cases but, we submit, under Sections 8 and 11 of the Clayton Act, the only decree which may be entered is to compel cessation of the particular interlocking directorships.

As pointed out in POINT V, *infra*, respondents contend that Section 11 of the Clayton Act vests exclusive jurisdiction in the Federal Trade Commission to enforce compliance with Section 8. However, even if the District Court has concurrent jurisdiction, as the Government here claims, it would seem clear that this concurrent jurisdiction does not empower the Court to grant further and different relief than is permitted to the Federal Trade Commission

for the same violation. Nor do any of the authorities cited by the Government support the proposition that when the Congress prescribes the form of relief in the event of a violation of law, as it has done in Section 11 with respect to Section 8, the courts may nevertheless grant further and different relief not authorized by the statute and not permitted to the Commission in which authority to enforce compliance with the Section has been vested.

It therefore follows that the contention of the Government that the instant cases are not moot or that the District Court erred because it is entitled to broad injunctive relief extending beyond terminating Mr. Hancock's three interlocking directorships involved, is unsound.

POINT IV.

THE CASES WERE APPROPRIATELY DECIDED BY SUMMARY JUDGMENT.

The Government has assigned as error the alleged failure of the District Court to "afford the plaintiff the opportunity to present evidence bearing on the need for the relief requested in the complaints" (R. 96) and complains in its brief (p. 13) that the District Court received no evidence on the need for injunctive relief.

The answer to this contention is that under Rule 56 of the Federal Rules of Civil Procedure, the Government was free to submit evidence in the District Court on the need for injunctive relief. The Government chose instead to remain silent.

There can be no doubt that summary judgment procedure is appropriate in these cases. This Court in *United States* v. *Grower-Shippers Vegetable Ass'n.*, 344 U. S.

901 (1952), summarily affirmed a dismissal for mootness on a motion made orally at pre-trial proceedings. Certainly a formal motion under Rule 56 is equally appropriate.

POINT V.

OTHER GROUNDS FOR DISMISSAL OF THE COMPLAINT.

Judge Conger, in his opinion, stated:

> "These are motions by the defendants to dismiss the complaints upon various grounds only one of which I feel it necessary to consider. That ground is that the controversy in each case is moot" (R. 72).

Among the other grounds upon which the defendants urged the complaints should be dismissed, are the following:

1. Section 11 of the Clayton Act vests authority to enforce compliance with Section 8 in the Federal Trade Commission and the Federal District Court is without jurisdiction to enforce it.

2. If the preceding contention is not sound, and if Section 15 of the Clayton Act does apply, in any event jurisdiction is limited to the individual director and there is no jurisdiction over the corporate defendants because Section 8 provides only that "no person * * * shall be a director in any two or more corporations * * *".

The arguments in support of these two other grounds for dismissal are contained in the briefs being filed in Civil Action 73-298 and Civil Action 73-296 in behalf of the other defendant companies in those actions.

CONCLUSION.

THE JUDGMENTS OF THE DISTRICT COURT SHOULD BE AFFIRMED.

Respectfully submitted,

EUSTACE SELIGMAN,
HOWARD T. MILMAN,
Attorneys for Appellees John M. Hancock, Sears, Roebuck and Co., Bond Stores, Inc. and Jewel Tea Co., Inc.

SULLIVAN & CROMWELL,
Of Counsel.

APPENDIX A

[COPY]

ADDRESS REPLY TO
"THE ATTORNEY GENERAL"
AND REFER TO
INITIALS AND NUMBER

V T K

60-0-38

DEPARTMENT OF JUSTICE
Washington 25, D. C.

June 19, 1947

Mr. J. M. Hancock
One William Street
New York 4, New York

Dear Mr. Hancock:

We understand that you are on the Board of Directors of Jewel Tea Company, Kroger Company, American Stores Company, Van Raalte Company, A. Stein Company, Sears Roebuck & Company, Bond Stores, Inc., S. H. Kress & Company, W. T. Grant Company, Flintkote Company, and Kimberly-Clark Corporation. In this connection, we would like to call your attention to Section 8 of the Clayton Act which reads in part as follows:

> . . . no person at the same time shall be a director in any two or more corporations, any one of which has capital, surplus, and undivided profits aggregating more than $1,000,000, engaged in whole or in part in commerce, . . . if such corporations are or shall have been theretofore, by virtue of their business and location of operation, competitors, so

> that the elimination of competition by agreement between them would constitute a violation of any provisions of any of the antitrust laws . . . .

While we do not mean to imply that by holding some or all of these directorships, you are necessarily violating the antitrust laws, we think that the matter raises serious questions under those laws which we would like to discuss with you or your counsel as soon as possible.

Sincerely yours,

/s/ JOHN F. SONNETT

John F. Sonnett
Assistant Attorney General